Reconstructing The Citadel: The Advent Of Jurisdictional Privity

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I. INTRODUCTION

> The fall of a citadel is a dramatic moment. The stronghold has long been invested; the siege has endured for months. Parallels have been dug and gun emplacements mounted; and a grim cannonade has made breaches in the great wall, behind which the defenders have erected demilunes, so that the struggle goes on. There is a final heavy bombardment; the assault goes forward against the main breach, and the storming party ascends over the corpses of the slain. . . .[1]

With these graphic words, Professor William Prosser heralded the New Jersey Supreme Court decision in *Henningsen v. Bloomfield Motors, Inc.*[2] as the "fall of the citadel of privity" in the field of product liability litigation.[3] The *Henningsen* decision, of course, determined that the manufacturer of an automobile and the automobile dealer could be liable for breach of an implied warranty of safety without any showing of privity of contract or negligence.[4]

Urging the adoption of "a shortcut which makes any supplier in the chain directly liable to the user,"[5] Prosser cited section 402A of the *Restatement (Second) of Torts* as a vehicle of sound and similar approach. Likewise, he credited the alacrity with which state courts accepted the *Henningsen* principle

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1 William L. Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 791 (1966).

2 161 A.2d 69 (N.J. 1960).

3 Prosser, *supra* note 1, at 791.

4 *Henningsen*, 161 A.2d at 84.

5 Prosser, *supra* note 1, at 799–800.

of strict liability without negligence and without privity of contract[6] as working "the most rapid and altogether spectacular overturn of an established rule in the entire history of the law of torts."[7] Prosser celebrated the fall of the citadel because the citadel had prevented an entire class of people from seeking recovery. Strict liability founded upon warranty had traditionally required some reliance by the plaintiff upon a seller's express or implied assertion and notice of breach within a reasonable time by the plaintiff-buyer.[8] Furthermore, contractual warranty was subject to disclaimer by the seller. Thus, strict liability founded upon warranty was restricted by substantive contract principles. As described by Prosser, it was a "a freak hybrid born of the illicit intercourse of tort and contract."[9]

By comparison, the absence of fanfare with which the United States Supreme Court has reconstructed a wall of the citadel so neatly undone by *Henningsen* and Restatement Section 402A has been striking. The reason for the relative silence of the tort community may well be that the vehicle for reconstruction in tort is a decision of the United States Supreme Court in civil procedure. By interjecting a requirement of "jurisdictional privity" into the stream of commerce rationale advanced in *World-Wide Volkswagen Corp. v. Woodson*,[10] the O'Connor plurality in *Asahi Metal Industry Co. v. Superior Court*[11] has made it virtually impossible for an injured plaintiff to sue a component parts manufacturer in any state or country other than its place of domicile or the state or country where delivery of the component part is made to a product assembler. Put in context, by imposing the requirement of a direct or tangible relationship between the component parts manufacturer and the state of the action, a plurality of the Supreme Court has made it virtually impossible for a plaintiff to sue directly any supplier in the chain. In short, they have replaced a concept of privity founded in contract with a concept of privity founded in jurisdiction and reconstructed a wall of the citadel.

In order to understand the concept of jurisdictional privity or appreciate its significance, it is necessary first to articulate the development of personal

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[6] The *Henningsen* court held "that under modern marketing conditions, when a manufacturer puts a new automobile in the stream of trade and promotes its purchase by the public, an implied warranty that it is reasonably suitable for use as such accompanies it into the hands of the ultimate purchaser. Absence of agency between the manufacturer and the dealer who makes the ultimate sale is immaterial." *Henningsen*, 161 A.2d at 84.

[7] Prosser, *supra* note 1, at 793–94 (footnote omitted).

[8] *Id.* at 801.

[9] *Id.* at 800. By contrast, the concept of strict liability in tort permits a court "to bypass the traditional warranty requirements of privity and notice and other points which would appear to be applicable in a cause of action based on warranty." 1A LOUIS R. FRUMER AND MELVIN I. FRIEDMAN, PRODUCTS LIABILITY § 3.03[4], at 3-396 and 3-399 (1992).

[10] 444 U.S. 286 (1980).

[11] 480 U.S. 102 (1987).

jurisdiction as an overriding rational construct in the analysis of amenability. Having once done that, the impact of jurisdictional privity becomes increasingly apparent. Thus, this Article will detail the development of personal jurisdiction, culminating in a recognition of the concept of jurisdictional privity. It will then discuss the impact of that concept on the law of products liability.

It is notable at the outset that, compared with its earlier precedent,[12] the United States Supreme Court has been prolific in examining questions of personal jurisdiction[13] since its landmark decision in *World-Wide Volkswagen Corp. v. Woodson*. This recent proclivity has in turn spawned scholarly debate about whether there exists a coherent doctrine of personal jurisdiction[14] and whether that doctrine ought properly be a matter of constitutional law.[15]

Assuming the constitutional rationality of the jurisdictional principles articulated in *Pennoyer v. Neff*,[16] it is important to establish that the developing doctrine of in personam jurisdiction was in fact coherent, culminating with the stream of commerce or make-a-market theory of *World-Wide Volkswagen Corp.*[17] Furthermore, the stream of commerce or make-a-market theory was intuitively correct in that it protected and advanced the disparate interests at stake in long-arm litigation. However, the interpretation of *World-Wide Volkswagen Corp.*'s stream of commerce or make-a-market theory, as adopted by the O'Connor plurality in *Asahi Metal Indus. Co. v. Superior Court*,[18] constitutes a retreat from the broad parameters of *World-Wide Volkswagen Corp.* As noted earlier, this retreat is significant first, because it introduces a requirement of narrowly-defined "jurisdictional privity" and second, because

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[12] *See, e.g.*, International Shoe Co. v. Washington, 326 U.S. 310 (1945); Milliken v. Meyer, 311 U.S. 457 (1940); Blackmer v. United States, 284 U.S. 421 (1932); Hess v. Pawloski, 274 U.S. 352 (1927); Pennoyer v. Neff, 95 U.S. 714 (1877).

[13] *See, e.g.*, Carnival Cruise Lines, Inc. v. Shute, 111 S. Ct. 1522 (1991); Burnham v. Superior Court, 495 U.S. 604 (1990); Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102 (1987); Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985); Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985); Calder v. Jones, 465 U.S. 783 (1984); Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984); Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 408 (1984); Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694 (1982).

[14] *See, e.g.*, Wendy C. Perdue, *Personal Jurisdiction and the Beetle in the Box*, 32 B.C. L. REV. 529, 530 (1991).

[15] *See, e.g.*, Patrick J. Borchers, *The Death of the Constitutional Law of Personal Jurisdiction: From* Pennoyer *to* Burnham *and Back Again*, 24 U.C. DAVIS L. REV. 19 (1990).

[16] 95 U.S. 714 (1877).

[17] World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1979).

[18] 480 U.S. 102, 108–12 (1987).

second, because that narrowly-defined jurisdictional privity effects a change in the substantive law of products liability.

A. *Jurisdiction: The Concept*

Although amorphous in concept, jurisdiction is really nothing more than governmental power and authority—quite literally, the power to declare the law.[19] Initial limitations on that power historically have been two-fold: They are in part territorial, i.e., there is some geographical stopping point to the power of any given state, and they are in part based on citizenship, which is largely a question of where an individual is domiciled. These two limitations, then, have formed the principle of extraterritoriality,[20] that is, the power of governments is limited generally to jurisdiction over their own territories and over their citizens within those territories.

Under the American concept of federalism, or sovereign state relationships in a federal system, the principle of extraterritoriality operates as between the states. New York and California, for example, are at once sister states and foreign states, yet each is regarded as sovereign within its own territory and with respect to its own citizens. Antithetical to the principle of extraterritoriality is the concept of "full faith and credit" embodied in Article IV, Section 1 of the United States Constitution.[21] The Full Faith and Credit provision, of course, implies that, if rendered by a court possessed of subject matter and personal jurisdiction, every judgment of that court has an extraterritorial force such that the same case may not be retried in any other state in the Union.

The jurisdictional question which occupies any further study in the area is how strictly or literally territorial limitations are defined in applying the principle of extraterritoriality. Do such concepts as citizenship or domicile or the transiency of persons permit an individual to escape the judicial power of a given state simply by physically leaving it (or for that matter never physically

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[19] *See* JONATHAN M. LANDERS ET AL., CIVIL PROCEDURE 59 (3d ed. 1992); CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3502 (1984 & Supp. 1992).

[20] Extraterritoriality implicates both subject matter and personal jurisdiction. *See* Note, *Predictability and Comity: Toward Common Principles of Extraterritorial Jurisdiction*, 98 HARV. L. REV. 1310, 1310 n.2 (1985); *see also* Allan R. Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 TEX. L. REV. 689, 698-99 (1987).

[21] U.S. CONST. art. IV, § 1 provides: "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof."

entering it)? The study of long-arm jurisdiction in large measure provides the answer to this question.

B. *Jurisdiction: The Interests*

The adequacy of any particular theory, such as the make-a-market theory advanced in *World-Wide Volkswagen Corp.*, depends on its ability to explain and predict an outcome consistent with protection of the legitimate interests at stake in long-arm jurisdiction. As a prelude to further discourse on the subject, therefore, it remains to identify the relevant interests.[22]

The state's interest in the exercise of jurisdiction is representative of the collective interests of its citizens. In that capacity, the state has an interest in regulating the conduct of anyone whose activities will have substantial impact upon it. Use of the term "substantial" necessarily implies a determination as to which conduct is worthy of regulation and which conduct is relegated to a certain state disinterest. Moreover, critical to this relegation of interests is an assessment of what is cost-effective. If the impact on the state is small, there is little interest in regulating that type of conduct and marshalling the forces of the state to enforce the regulation. On the other hand, if the impact on the state is substantial, there is a greater interest in regulating such conduct.

The plaintiff likewise has an interest in the judicial power of a given state. Specifically, the plaintiff's interest is the opportunity to be heard on a claim as inexpensively as possible. Having to litigate in a foreign forum may be prohibitive, especially if it involves underwriting travel costs for attorneys and witnesses. Such costs may even render a victory pyrrhic.

Finally, the interest of the defendant is also critical. That interest is surely to avoid the risk of a non-meritorious case, but it is also an interest in being compelled to defend only in a forum where he or she stands a fair chance of litigating the merits—again, as inexpensively as possible.

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[22] At least one author has examined these factors incident to whether the exercise of jurisdiction over a given defendant is reasonable within some greater "fair play and substantial justice" test. *See, e.g.*, Leslie W. Abramson, *Clarifying "Fair Play and Substantial Justice": How the Courts Apply the Supreme Court Standard for Personal Jurisdiction*, 18 HASTINGS CONST. L.Q. 441, 444–68 (1991). In contrast, this author suggests that such factors have always been relevant in the determination of whether the contacts of a given defendant with the forum state are qualitatively high enough to support general or specific jurisdiction. *See infra* subpart II.A.

II. COHERENCY IN THE DEVELOPMENT OF IN PERSONAM JURISDICTION

A. Pennoyer *Through* Kulko

In 1877, the United States Supreme Court decided *Pennoyer v. Neff*,[23] which stood for 100 years as the primer for personal jurisdiction. It is this decision from which the principle of extraterritoriality, which is often referred to as the "power principle," emanates.[24] The critical issue in *Pennoyer* was the amenability of (or sufficiency of the state's relationship to) an absent, non-resident (non-domiciled) defendant.[25] The well-known facts were that Mitchell had sued Neff, a California domiciliary, in Oregon to recover payment of fees for legal services Mitchell rendered to Neff. A summons was served on the absent Neff by publication, and jurisdiction was obtained over Neff on the basis that Neff owned property in the State of Oregon, although such property was never attached (or even owned) at the outset so as to establish quasi in rem jurisdiction. Mitchell took a default judgment against Neff and recovered damages pursuant to a sheriff's sale of Neff's land. Neff later commenced suit in Oregon to recover possession of the land as against Pennoyer, the purchaser.[26]

The Supreme Court in *Pennoyer* acknowledged as "a principle of general, if not universal, law,"[27] that in an action for money or damages, *i.e.*, a personal action, "where a defendant does not appear in the court, and is not found within the State, and is not a resident thereof, but has property therein, the jurisdiction of the court extends only over such property."[28] In making that statement, the Court implicitly recognized the three traditional bases of in personam jurisdiction: "appear in court"—consent; "found within the state"—presence;[29] and "resident thereof"—domicile.[30] The presence of an individual's

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[23] 95 U.S. 714 (1877).

[24] *See, e.g.*, Russell J. Weintraub, *Jurisdiction Over the Foreign Non-Sovereign Defendant*, 19 SAN DIEGO L. REV. 431, 432 (1982). For a general discussion of the origins of the power theory of jurisdiction, see Luther L. McDougal III, *Judicial Jurisdiction: From a Contacts to an Interest Analysis*, 35 VAND. L. REV. 1, 2 (1982) and Linda J. Silberman, Shaffer v. Heitner*: The End of an Era*, 53 N.Y.U. L. REV. 33, 44–46 (1978).

[25] *Pennoyer*, 95 U.S. at 734.

[26] *Id.* at 716.

[27] *Id.* at 720.

[28] *Id.*

[29] Presence within the forum as a concept is more commonly referred to as "transient jurisdiction." Many commentators have criticized this aspect of the *Pennoyer* decision as being outdated, inconsistant with later Supreme Court decisions, and potentially unconstitutional. *See, e.g.*, Daniel O. Bernstine, Shaffer v. Heitner: *A Death Warrant for the Transient Rule of the Personam Jurisdiction?*, 25 VILL. L. REV. 38 (1979); Lea Brilmayer et al., *A General Look at General Jurisdiction*, 66 TEX. L. REV. 723 (1988);

property within the state would support only in rem or quasi in rem jurisdiction.

The Court also indicated that the sovereignty of a state would permit the state to determine for itself the "civil *status* and capacities of its inhabitants"[31] or domiciliaries, such as rites of marriage, form of contracts, and rights arising under contract.[32] These determinations, of course, necessarily have some extra-territorial effect. Consistent with the power principle, a state could compel its domiciliaries, for example, to conform to one type of contract to transfer property situated beyond the boundaries of the forum state.[33] Likewise, a state could subject real property within its own borders, which might be owned by non-domiciliaries, to decretal transfer in payment of the demands of its own citizens.[34]

Donald W. Fyr, Shaffer v. Heitner: *The Supreme Court's Latest Last Words on State Court Jurisdiction*, 26 EMORY L.J. 739 (1977); Frank R. Lacy, *Personal Jurisdiction and Service of Summons After* Shaffer v. Heitner, 57 OR. L. REV. 505 (1978); Robert A. Sedler, *Judicial Jurisdiction and Choice of Law: The Consequences of* Shaffer v. Heitner, 63 IOWA L. REV. 1031 (1978); Linda J. Silberman, Shaffer v. Heitner: *The End of an Era*, 53 N.Y.U. L. REV. 33 (1978); David H. Vernon, *Single-Factor Bases of the Personam Jurisdiction—A Speculation of the Impact of* Shaffer v. Heitner, 1978 WASH. U. L.Q. 273; Donald J. Werner, *Dropping the Other Shoe:* Shaffer v. Heitner *and the Demise of Presence-Oriented Jurisdiction*, 45 BROOK. L. REV. 565 (1979).

However, on May 29, 1990, a unanimous Supreme Court affirmed the constitutionality of transient jurisdiction in Burnham v. Superior Court, 495 U.S. 604 (1990). The opinion of Justice Scalia, joined in pertinent part by Chief Justice Rehnquist and Justices Kennedy and White, premised Due Process compliance on historical tradition:

> The short of the matter is that jurisdiction based on physical presence alone constitutes due process because it is one of the continuing traditions of our legal system that define the due process standard of "traditional notions of fair play and substantial justice." That standard was developed by *analogy* to "physical presence," and it would be perverse to say it could now be turned against that touchstone of jurisdiction.

Id. at 619.

The opinion of Justice Brennan, however, joined by Justices Marshall, Blackmun and O'Connor, premised Due Process compliance on the fact that "by visiting the forum State, a transient defendant actually 'avail[s]' himself . . . of significant benefits provided by the State." *Id.* at 637.

[30] The term "residence" must be distinguished from citizenship or domicile. An individual may have many residences but is a citizen or domiciliary of only one state at any given time. *See, e.g.*, Mas v. Perry, 489 F.2d 1396 (5th Cir. 1974). For a general discussion of *Pennoyer*'s threefold framework, see Kevin M. Clermont, *Restating Territorial Jurisdiction and Venue for State and Federal Courts*, 66 CORNELL L. REV. 411 (1981).

[31] Pennoyer v. Neff, 95 U.S. 714, 722 (1877).

[32] *Id.*

[33] *Id.* at 723.

[34] *Id.*

Vestiges of the power principle remain today in virtually every jurisdiction. Many personal jurisdiction statutes, for example, delineate the grounds therefor in terms of consent, presence and domicile.[35] The immediate results of *Pennoyer*, however, were somewhat bizarre. If the plaintiff had an action on a debt, i.e., a personal action against a non-resident defendant who could not be found within the forum state, the plaintiff's options for suing the defendant in the forum state were severely limited. The first option available to a plaintiff was completely fortuitous: the plaintiff might wait in the hopes that the defendant would reappear at some time within the boundaries of the forum state. If the plaintiff then served the defendant within the boundaries of the forum state, the defendant would be present and amenable. Of course, if the statute of limitations happened to run during the interim, the plaintiff might be barred from pursuing any remedy against that defendant.[36] The second option could prove expensive: the plaintiff might proceed to the state in which the defendant could be found and commence an action within the courts of that state, thus satisfying the jurisdictional requirements of the foreign state. This required the plaintiff to travel to the foreign state and retain counsel in the foreign state. However, since subpoena power was likewise restricted to the geographic boundaries of the forum state,[37] plaintiff could not compel the attendance of witnesses from its "home" state, where all such witnesses were likely to be, and force them to appear in the courts of the forum state. The third alternative was only available in cases where the defendant was known to hold property of significant value in the plaintiff's home state. However, since the plaintiff could not obtain personal jurisdiction over the defendant, the plaintiff's case had to be reclassified as an action against the property in which the plaintiff had to proceed first by attaching the property as if it were an agent for service of process against the defendant. Moreover, the adequacy of any remedy provided by this option depended on the value of the defendant's property. Since quasi in rem jurisdiction gave a court power over the person of the defendant only to the value of his or her property, such property had to at

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[35] *See, e.g.*, N.C. GEN. STAT. §§ 1-75.4(1)(a)-(c) (1983) and WIS. STAT. § 801.05 (l)(a)-(c) (1988), which have retained presence, consent and domicile as sufficient to confer general personal jurisdiction; *see also* ALASKA STAT. § 09.05.015(1)(A)-(C) (1983); MD. CTS. & JUD. PROC. CODE ANN. § 6-102(a) (1989).

[36] *See generally* 54 C.J.S. *Limitations of Actions* §§ 10-14 (1987). In some cases, expiration of the period of limitations would extinguish the right of action as well as the remedy and even deprive the trial court of subject matter jurisdiction.

[37] *See, e.g.*, WIS. STAT. § 757.01(1) (1988). There were likewise instances of serving process on a given defendant while aboard an airplane as the aircraft was navigating airspace over the forum state. *See, e.g.*, Grace v. MacArthur, 170 F. Supp. 442 (E.D. Ark. 1959).

least equal the value of the debt, or else the plaintiff would be required to bring an action in the defendant's home state for the remaining monies.

One reason the *Pennoyer* power principle prevailed for so long is that certain exceptions and modifications were recognized that enabled courts to exercise jurisdiction over non-consenting non-domiciliaries in many common kinds of cases. Some were recognized by the decision in *Pennoyer* itself. Quasi in rem jurisdiction, for example, extended not only to tangible real or personal property within the state but also to intangibles such as corporate stock, bank accounts, and even personal debts owed by a private individual to the defendant.[38]

In divorce actions, marital status was considered a res present within the state, which allowed the courts to determine the interests of all parties in the marriage, whether domiciled in the forum state or not.[39] Thus, there existed a basis for in rem jurisdiction under the exercise of a state's police power. The divorce proceeding was viewed as divisible into two aspects: (l) the status, which could be adjudicated by a court at the domicile of the plaintiff without personal jurisdiction over the defendant, and (2) the property, which could only be adjudicated by a court which could gain in personam jurisdiction over the defendant or in rem jurisdiction over the defendant's property.

There were several other crucial decisions which had direct impact upon the *Pennoyer* power principle. In *Blackmer v. United States*,[40] the United

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[38] *See* Harris v. Balk, 198 U.S. 215 (1905). In that case, Harris owed Balk money, and Balk owed Epstein money. Harris, a domiciliary of North Carolina, traveled to Maryland, where Epstein was domiciled. Epstein served Harris with process in Maryland in order to attach Harris's debt to Balk. Maryland's long-arm statute provided for attachment of the debt if a debt of the debtor was found within the jurisdiction of the state of Maryland and the court obtained personal jurisdiction over the debtor by serving process on him in that state. The Maryland court adjudicated Balk's debt to Epstein and ordered Harris to pay Epstein the money he owed Balk in satisfaction of Balk's debt to Epstein. Balk later collaterally attacked the judgment of the Maryland court, arguing that the Maryland court lacked personal jurisdiction over him. The Supreme Court upheld the Maryland judgment, however, noting that "the obligation of the debtor to pay his debt clings to and accompanies [the debtor] wherever [the debtor] goes." *Id.* at 222. Because Harris's debt to Balk (the intangible property) was unrelated to the claim Epstein had against Balk, the consequence of this decision was to make a person, here Balk, generally amenable or subject to general personal jurisdiction in any forum in which his debtor could be found.

[39] Arthur Taylor von Mehren, *Adjudicatory Jurisdiction: General Theories Compared and Evaluated*, 63 B.U. L. REV. 279, 286 (1983); Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610, 618 n.35 (1988); Julia M. Carpenter, Note, Miller v. Kite*: Should Domestic Disputes Require the Maximum of Minimum Contacts?*, 64 N.C. L. REV. 825, 835 (1986); Thomas C. Mundell, Comment, *Securing Personal Jurisdiction Over Nonresidents in Spousal and Child Support Suits: Is California's Long-Arm Too Short?*, 17 SAN DIEGO L. REV. 895, 901-02 (1980).

[40] 284 U.S. 421 (1932).

States Supreme Court ruled in a federal context that a personal judgment (here a fine) could be taken against a non-resident citizen of the United States simply by reason of that person's citizenship. Blackmer was wanted as a witness in a criminal prosecution arising out of the Teapot Dome scandal. Congress had passed a statute which permitted service of a subpoena on Blackmer, who was hiding out in Paris. Blackmer was served, but when he failed to appear, he was held in contempt and fined, and his property in the United States was seized to satisfy the fine. In a subsequent action to regain title to the property, the Supreme Court upheld the imposition of the fine, despite the contention that the United States had no jurisdiction over Blackmer in Paris. The Court reasoned that a country may summon and demand the presence of its citizens no matter where they may reside.[41]

That principle was extended in *Milliken v. Meyer*[42] to include state citizenship and ordinary civil actions. *Milliken* established the prevailing rule

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> Nor can it be doubted that the United States possesses the power inherent in sovereignty to require the return to this country of a citizen, resident elsewhere, whenever the public interest requires it, and to penalize him in case of refusal. . . . It is also beyond controversy that one of the duties which the citizen owes to his government is to support the administration of justice by attending its courts and giving his testimony whenever he is properly summoned.

Blackmer, 284 U.S. at 437, 438 (citations omitted).

42 311 U.S. 457 (1940). Here, Milliken brought suit against Meyer in Meyer's home state of Wyoming. Meyer, however, was temporarily residing in Colorado, and Milliken served him with Wyoming process in Colorado. Meyer refused to appear in Wyoming and defaulted. The Wyoming court issued a personal judgment against Meyer for certain monies. Later, Meyer sued Milliken in Colorado for the return of those monies. Milliken invoked the Full Faith and Credit Clause in defense, and the Supreme Court ruled that the Colorado court was bound by the Wyoming judgment because Meyer was a domiciliary of Wyoming at the time of service. Commenting upon the reciprocal responsibilities attendant to state citizenship, the Court noted that the state of domicile may require its citizens to appear and defend cases even when they are absent from the forum state or temporarily residing elsewhere. The Court stated:

> Certainly then Meyer's domicile in Wyoming was a sufficient basis for that extraterritorial service. As in case of the authority of the United States over its absent citizens (*Blackmer v. United States*, 284 U.S. 421), the authority of a state over one of its citizens is not terminated by the mere fact of his absence from the state. The state which accords him privileges and affords protection to him and his property by virtue of his domicile may also exact reciprocal duties. "Enjoyment of the privileges of residence within the state, and the attendant right to invoke the protection of its laws, are inseparable" from the various incidences of state citizenship. . . . The responsibilities of that citizenship arise out of the relationship to the state which domicile creates. That relationship is not dissolved by mere absence from the state. The attendant duties, like the rights and privileges incident to domicile, are not dependent on

that a state has extra-territorial power to summon its citizens, *i.e.*, its domiciliaries, from wherever they may be to return to the forum state in order to defend an action commenced there against them.

Other than these two decisions, the dictates of *Pennoyer v. Neff* persisted largely unimpaired until the decision in *International Shoe Co. v. Washington*.[43] There was, however, one exception—the decision in *Hess v. Pawloski*,[44] but that decision is difficult to rationalize from existing precedent. The decision in *Hess v. Pawloski* was clearly prompted by the increase in interstate vehicular traffic. As such traffic increased, state after state became increasingly concerned with hit-and-run foreign motorists who would enter the forum state, cause a traffic accident, and escape to a foreign state, rendering themselves immune from civil prosecution under *Pennoyer*.

Clearly, the Supreme Court had to become legally inventive in deciding *Hess*. The *Hess* Court stated that when Massachusetts, like many other states, enacted its non-resident motor vehicle statute, a statute that declared that every person who used the state highways appointed the Motor Vehicle Commissioner as his or her agent for service of process, there existed an implied consent on the part of every non-resident motorist to create that agency.[45] The Supreme Court, of course, ignored the premise of agency law that any person who appoints a special agent can revoke the agency, and stated that Massachusetts had a preeminent authority under its police power to enact such a statute, which was reasonably calculated to promote care on the part of all persons who used its highways.[46] It therefore justified the creation of implied consent by reference to the police power of the state.[47] Motor vehicles were inherently dangerous machines whose use in a state could thus reasonably be regulated as against non-residents and residents alike.

As applied to natural persons, *Pennoyer* probably made a great deal of sense because natural persons have natural domiciles to which they confine the

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> continuous presence in the state. One such incident of domicile is amenability to suit within the state even during sojourns without the state, where the state has provided and employed a reasonable method for apprising such an absent party of the proceedings against him.

Id. at 463–64.

[43] 326 U.S. 310 (1945).

[44] 274 U.S. 352 (1927).

[45] *Id.* at 356.

[46] *Id.* Defendant probably could not successfully revoke the agency, however, simply by affixing a sign to his bumper stating, "My operation of this vehicle within this state does not constitute the appointment of any person as my agent for service of process." The decision in Kane v. New Jersey, 242 U.S. 160 (1916) stood for the rather dubious proposition that states had the power to exclude a non-resident motorist who failed to sign a "consent" document from the jurisdiction. Such a disclaimer would therefore have been to no avail.

[47] *Hess*, 274 U.S. at 356.

bulk of their activities. However, unlike natural persons, corporations are fictive legal persons which have no tangible presence and exist only in the contemplation of the law.[48] Inasmuch as corporations could be enfranchised by a particular sovereign state, however, they could be recognized as domiciliaries of the particular state of incorporation, consistent with the *Pennoyer* power principle. Yet this concept of corporate domicile became deceptive, especially when states like Delaware enacted liberal general corporation laws which balanced a maximum number of enabling provisions against a minimum number of responsibilities to creditors, shareholders or the public.[49] The result was that by 1932, "[f]or some 42,000 corporations, including more than one-third of the industrial corporations listed on the New York Stock Exchange, Delaware was 'home.'"[50]

Moreover, as economic activity became more commonly transacted in the form of corporate business carried on in foreign non-domicile states, it became necessary for courts to provide for suits by and against corporate entities in those foreign states. Thus, there evolved a consent theory of jurisdiction over foreign corporations,[51] which served as a valid basis for in personam jurisdiction in both federal and state courts.[52] This theory was predicated on the maxim that the state could extract consent to be sued (in the form of appointment of an agent for service of process) as a condition of doing

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[48] This notion was advanced early on by Chief Justice Taney in Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 517, 588 (1839):

> [A] corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law, and by force of the law; and where that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty.

[49] *See also* Joel Seligman, *A Brief History of Delaware's General Corporation Law of 1899*, 1 DEL. J. CORP. L. 249, 271–75 (1976). *See generally* S. Samuel Arsht, *A History of Delaware Corporation Law*, 1 DEL. J. CORP. L. 1, 20–22 (1976); Comment, *Law for Sale: A Study of the Delaware Corporation Law of 1967*, 117 U. PA. L. REV. 861, 862–63 & n.8 (1969).

[50] Seligman, *supra* note 49, at 275. The author goes on to note that "[i]n one office alone of the Industrial Trust Building in Wilmington, 12,000 separate corporations claimed their existence; and in the lobby of that very same building, 12,000 separate corporations posted their names in identical picayune lettering in a determined attempt to comply with the General Corporation Law's requirement that a corporate sign be 'displayed.'" *Id.* at 275–76.

[51] *See* Edward W. Cleary & Arthur R. Seder, Jr., *Extended Jurisdictional Bases for the Illinois Courts*, 50 NW. U. L. REV. 599, 600 (1955).

[52] *See, e.g.*, Railroad Co. v. Harris, 79 U.S. (12 Wall.) 65, 81–82 (1870); Ex Parte Schollenberger, 96 U.S. 369, 376–78 (1877).

corporate business within the forum state.[53] As stated by Mr. Justice Curtis for a nearly unanimous Court in *Lafayette Insurance Co. v. French*:[54]

> A corporation created by Indiana can transact business in Ohio only with the consent, express or implied, of the latter State. . . . This consent may be accompanied by such conditions as Ohio may think fit to impose; and these conditions must be deemed valid and effectual by other States, and by this court, provided they are not repugnant to the constitution or laws of the United States . . . .[55]

Specific limitations on any accompanying conditions of consent and the judicial impetus for "consent to do business" statutes were later set forth in *St. Clair v. Cox*:[56]

> The State may . . . impose as a condition upon which a foreign corporation shall be permitted to do business within her limits, that it shall stipulate that in any litigation arising out of its transactions in the State, it will accept as sufficient the service of process on its agents or persons specially designated; and the condition would be eminently fit and just. And such condition and stipulation may be implied as well as expressed.[57]

Although the consent theory of corporate amenability continued to be operative in the Supreme Court as late as 1933,[58] logical difficulties with the theory[59] prompted the emergence of the presence doctrine,[60] whose evolution

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[53] For a thorough discussion of in personam jurisdiction over corporations during this era, see generally Philip B. Kurland, *The Supreme Court, the Due Process Clause and the In Personam Jurisdiction of State Courts from* Pennoyer *to* Denckla*: A Review*, 25 U. CHI. L. REV. 569, 577–86 (1958).

[54] 59 U.S. (18 How.) 404 (1855).

[55] *Id.* at 407.

[56] 106 U.S. 350 (1882).

[57] *Id.* at 356.

[58] *See* Washington *ex rel.* Bond & Goodwin & Tucker, Inc. v. Superior Court of Washington, 289 U.S. 361, 364 (1933).

[59] Professor Philip Kurland develops the logical fallacies inherent in the evolution of the consent doctrine, making much of the Supreme Court's disparate treatment of corporate in personam jurisdiction based upon "implied consent" to be sued and that based upon "true" consent secured by the actual appointment of an agent for service of process within the forum state. For a pointed discussion of this and other conceptual problems attendant to the "consent" doctrine, see Kurland, *supra* note 53, at 579–82.

[60] *See* Philadelphia & Reading R.R. v. McKibbin, 243 U.S. 264, 265 (1917) ("A foreign corporation is amenable to process to enforce a personal liability, in the absence of consent, only if it is doing business within the State in such manner and to such extent as to warrant the inference that it is present there."); Barrow Steamship Co. v. Kane, 170 U.S. 100 (1898); New England Mutual Life Ins. Co. v. Woodworth, 111 U.S. 138 (1884).

followed a similar fate. Unlike the predecessor consent theory, the presence doctrine required an examination of the intrastate activities of the foreign corporation in order to ascertain the corporation's presence and hence its amenability.[61] Moreover, the presence theory would sustain personal jurisdiction over foreign corporations regardless of whether the claims arose out of business transacted within the forum state, though a cessation of business would preclude any later assertion of amenability.[62] Perhaps the most cogent statement of the presence theory, and one which likewise exposed its fallacy, is contained in the opinion of the Second Circuit Court of Appeals in *Hutchinson v. Chase & Gilbert, Inc.*,[63] written by Judge Learned Hand:

> It scarcely advances the argument to say that a corporation must be "present" in the foreign state, if we define that word as demanding such dealings as will subject it to jurisdiction, for then it does no more than put the question to be answered. . . .
>
> When we say, therefore, that a corporation may be sued only where it is "present," we understand that the word is used, not literally, but as shorthand for something else. . . . There must be some continuous dealings in the state of the forum; enough to demand a trial away from its home.
>
> This last appears to us to be really the controlling consideration, expressed shortly by the word "presence," but involving an estimate of the inconveniences which would result from requiring it to defend, where it has been sued. We are to inquire whether the extent and continuity of what it has done in the state in question makes it reasonable to bring it before one of its courts. . . . This does not indeed avoid the uncertainties, for it is as hard to judge what dealings make it just to subject a foreign corporation to local suit, as to say when it is "present," but at least it puts the real question, and that is something.[64]

Adopting a result-oriented approach, the courts thus used either the consent or the presence theory, depending upon which would support jurisdiction over the particular non-resident corporation.[65] As applied, however, each theory posed some difficulty since it was necessary to decide whether a corporation was "doing business" within the forum state in order to ascertain whether the corporation's consent could be properly implied or whether it was in fact "present."[66] Thus, case law focused increasingly on the meaning of "doing

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[61] *See* Cleary & Seder, *supra* note 51, at 600.

[62] Kurland, *supra* note 53, at 583.

[63] 45 F.2d 139 (2d Cir. 1930).

[64] *Id.* at 141.

[65] Kurland, *supra* note 53, at 584.

[66] *Id.*; *see also* Louis P. Haffer, *Personal Jurisdiction over Foreign Corporations as Defendants in the United States Supreme Court*, 17 B.U. L. REV. 639, 643–44 (1937) ("From the oft-repeated assertion in the cases which have adopted the presence theory that

business," resulting in a substitution of that conclusory criterion for the earlier, more reasoned theories.[67]

Furthermore, in the absence of corporate domesticity or appointment of a corporate agent for service of process pursuant to a consent statute,[68] it was difficult to obtain jurisdiction over a foreign corporation that was technically absent from the forum state. Although a corporation might flood a market with its products, if it (l) had no offices or general agents within the forum state; (2) made no contracts within the forum state;[69] (3) received no monies in payment for goods in the forum state;[70] and (4) held title to no property within the forum state, it transacted no business in the forum state which might render it amenable to suit. It was thought that a corporation which had so insulated itself was a foreign corporation, entitled to the protection of *Pennoyer v. Neff.*

In such a manner, International Shoe Corporation claimed that it had effectively insulated itself and was therefore subject to the protections of *Pennoyer*. International Shoe was a Delaware corporation with its principal

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'the corporation must be doing business in the state under such circumstances as to warrant the inference that it is present there' it would seem to follow that a corporation is not 'present' within the jurisdiction when its transactions do not quite approach the 'doing of business' necessary to render it amenable to the service of process.") (quoting Philadelphia & Reading R.R. v. McKibbin, 243 U.S. 264, 265 (1916)).

[67] The doing business test itself became a mechanical exercise in which jurisdiction depended more on the similarity of facts with decided cases than with the reasonableness or fairness of requiring the defendant to appear. *See* Cleary & Seder, *supra* note 51, at 600–01; Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 810–12 (1935).

[68] Author Louis Haffer examined the problem of jurisdiction over foreign corporations under the then-extant consent statutes. *See* Haffer, *supra* note 66, at 648–49.

[69] The "place of the making" of the contract is the place where the last act necessary to make a binding contract has occurred, and is traditionally the place where the acceptance becomes effective. *See, e.g.*, 1 ARTHUR L. CORBIN, CONTRACTS § 78 (1963); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 332 (1971).

[70] The United States Supreme Court in International Harvester v. Kentucky, 234 U.S. 579 (1914), confronted the issue whether International Harvester's method of carrying on its affairs in Kentucky constituted "doing business" within that state such that service of process upon its agent rendered it amenable to suit. The Court concluded that the company's "continuous course of business in the solicitation of orders which were sent to another State and in response to which the machines of the Harvester Company were delivered within the State of Kentucky" were sufficient to hold it responsible under the process of the Kentucky state courts. *Id.* at 585. Distinguishing the case at bar, however, from its earlier decision in Green v. Chicago, Burlington & Quincy Ry., 205 U.S. 530 (1907), the Court was careful to note that the instant case involved more than mere solicitation: "In the case now under consideration there was something more than mere solicitation. In response to the orders received, there was a continuous course of shipment of machines into Kentucky. *There was authority to receive payment in money, check or draft, and to take notes payable at banks in Kentucky.*" *International Harvester*, 234 U.S. at 587 (emphasis added).

place of business in St. Louis, Missouri. It made no contracts in the State of Washington; all shoes were shipped f.o.b. from outside Washington; purchasers made no payments to salesmen inside the state but instead sent payments to the corporate home office in St. Louis; there existed no corporate offices in the state, and the only employees were commissioned salesmen—that is, the employees were simply soliciting agents, not general agents possessed of any power to bind.[71] International Shoe therefore claimed that its contacts were insufficient to establish a presence within the State of Washington, *i.e.*, the corporation was not doing business in the State of Washington and could not be amenable to suit in that state consistent with the Due Process Clause of the Fourteenth Amendment.

The Supreme Court responded to that argument by suggesting that the concepts of presence and doing business must give way to the reasonableness test of the Due Process Clause.[72] It defined that reasonableness test as follows: "[I]n order to subject a defendant to a judgment *in personam* . . . he [must] have certain minimum contacts . . . such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[73] Thus was born the "minimum contacts" test. The language of *International Shoe*, however, did not entirely supplant the power principle of *Pennoyer v. Neff*. The Court explains:

> Historically the jurisdiction of courts to render judgment *in personam* is grounded on their de facto power over the defendant's person. Hence his presence within the territorial jurisdiction of a court was prerequisite to its rendition of a judgment personally binding him. . . . But now that the *capias ad respondendum* has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment *in personam, if he be not present within the territory of the forum*, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."[74]

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[71] International Shoe Co. v. Washington, 326 U.S. 310, 313–14 (1945).

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> [T]he terms 'present' or 'presence' are used merely to symbolize those activities of the corporation's agent within the state which courts will deem to be sufficient to satisfy the demands of due process. . . . Those demands may be met by such contacts of the corporation with the state of the forum as make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there.

International Shoe, 326 U.S. at 316–17 (citation omitted).

[73] *Id.* at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

[74] *Id.* (citation omitted) (emphasis added).

International Shoe therefore did not and does not affect the principles of domesticity or citizenship—they remain a vestige of the power principle. However, it redefines the power principle's concepts of consent and presence and substitutes instead the minimum contacts test or fundamental fairness test for the traditional concepts of presence and doing business. Consistent with the notion of presence advanced earlier by Learned Hand,[75] the Court explains that the concept of presence is merely a symbol of a certain quantity and quality of activity by the defendant in the forum state which is sufficient to satisfy the demands of due process of law. Thus, *International Shoe* affected the symbolic notion of presence as outlined by *Pennoyer*. It focused on the activities of the defendant in the forum state in every case in which the defendant was not domesticated, *i.e.*, cases in which it was not a citizen or incorporated.

Moreover, the Court's opinion in *International Shoe* recognized a range of activities determinative of amenability that had been represented by prior cases which it now sought to examine in light of this reasonableness standard. It found essentially that those cases fell into three categories, dependent upon two factors: (1) a frequency criterion: how continuous and systematic the subject's contacts with the forum state, and (2) a relatedness criterion: whether contacts with the forum state "[gave] rise to the obligations or liabilities sued on."[76] The Court thus sought to structure amenability. There were *maximal* contacts—continuous and systematic activity which supported amenability, whether or not the activity was related to a given claim, *i.e.*, general amenability. There were also *minimal* contacts—casual and isolated activities which were unrelated to the claim, which resulted in no amenability as between the defendant and the forum state. Finally, there were *minimum* contacts—isolated contacts which were qualitatively sufficient to support a related claim.[77] It was these minimum contacts which supported specific amenability. Moreover, the Court seemed to suggest that it would examine at least two factors to assess the *quality* of the contacts and thus whether such contacts would support a related claim: (1) the interest of the state in regulating activities of the kind at issue, and (2) the inconvenience to the defendant—whether it was reasonable in view of the defendant's activities to require the defendant to appear and defend in the forum state.[78] As time went on, the Supreme Court increasingly looked to the existence of specific jurisdictional statutes as evidence of a state's particularized interest in the conduct of the defendant.[79]

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[75] *See infra* p. 423-24 and accompanying notes.

[76] International Shoe Co. v. Washington, 326 U.S. 310, 317 (1945).

[77] *Id.* at 318.

[78] *Id.* at 317-18.

[79] *See, e.g.*, Kulko v. California Supreme Court, 436 U.S. 84, 98 (1978) ("California has not attempted to assert any particularized interest in trying such cases in its courts by, *e.g.*, enacting a special jurisdictional statute."); McGee v. International Life Ins. Co., 355

Use of the term "minimum contacts" in describing requirements of the Due Process Clause suggested to some courts that attention should focus on a defendant's physical contacts or connections with the forum state.[80] There were two principal reasons for this: (1) ease of inquiry—if no demonstrable physical activity could be traced to the defendant, then the court could conclude that the defendant lacked even minimum contacts and the case could be dismissed without further inquiry, and (2) the persistence of territorial power thinking.

Another approach adopted by the courts looked broadly to the fairness of requiring the defendant to defend a particular suit brought by the plaintiff in the forum.[81] Thus, there might be cases in which jurisdiction would be proper, even though the defendant had only a remote connection to the forum, if the factors favoring that forum were strong enough. As the Court noted in *International Shoe*,

> Whether due process is satisfied must depend. . . upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. That clause does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations.[82]

Then, in *McGee v. International Life Insurance Company*,[83] the Supreme Court upheld a California state court's jurisdiction over a Texas insurance company whose only physical contacts with California were (1) solicitation by mail to insure one California resident, and (2) acceptance by the company of premium payments from the client for a two-year period, which payments were mailed from California. Otherwise, the company had no office or agent in California and solicited no insurance business in California. Nevertheless, the Supreme Court upheld jurisdiction premised upon a specific California statute on grounds that the suit was based on a contact which had "substantial connection with that State."[84] The Court looked to the needs of the state to

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U.S. 220, 224 (1957) ("The [California statute] did nothing more than to provide petitioner with a California forum to enforce whatever substantive rights she might have against respondent.").

[80] *See, e.g.*, Davis v. American Family Mut. Ins. Co., 861 F.2d 1159 (9th Cir. 1988); Rambo v. American S. Ins. Co., 839 F.2d 1415 (10th Cir. 1988); Aaron Ferer & Sons Co. v. American Compressed Steel, 564 F.2d 1206 (8th Cir. 1977).

[81] American Land v. Bonaventura Uitgevers Maatschappij, 710 F.2d 1449 (10th Cir. 1983); Leney v. Plum Grove Bank, 670 F.2d 878, 880 (10th Cir. 1982); Forum Publications, Inc. v. P. T. Publishers, Inc., 700 F. Supp. 236, 247 (E.D. Pa. 1988); Meineke Discount Muffler Shops, Inc. v. Feldman, 480 F. Supp. 1307, 1312 (S.D. Tex. 1979).

[82] International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945).

[83] McGee v. International Life Ins. Co., 355 U.S. 220 (1957).

[84] *Id.* at 223.

regulate insurance solicitation in its borders and the relative convenience of requiring a business to defend itself in a state where it engages in economic activity. The Court said, therefore, that this isolated contact was qualitatively sufficient to support amenability with respect to the related claim. It was, of course, the defendant in *McGee* who had targeted the plaintiff (who was at the time physically located within the particular forum state of California) for its activities. Thus the Court utilized a methodology for assessing minimum contacts which later found favor in such cases as *Calder v. Jones*.[85]

Those who saw *McGee* as a resolution of the issue of whether physical contacts or general balance of fairness should control amenability were

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[85] 465 U.S. 783 (1984). Although perhaps more notorious for its impact on the law of libel, the *Calder* case is significant as well for its impact on the law of personal jurisdiction. Plaintiff Shirley Jones had commenced an action in the California courts for libel against the National Enquirer, Inc. (a Florida corporation with its principal place of business in Florida), the magazine's local California distributor, and two Florida domiciliaries: Ian Calder, the president and editor of the *National Enquirer* who oversaw the corporation's functions and in particular approved and edited the libelous article, and John South, a reporter who wrote the libelous story. Personal jurisdiction was challenged only by the two individuals who moved to quash service of process on grounds that their contacts with California were minimal and thus insufficient to meet the demands of due process. Calder, for example, had no physical contact with California other than one pleasure trip prior to the publication of the article and one business trip afterwards to testify in an unrelated trial. South, on the other hand, made many visits per year to California but only one questionable visit related to the story.

In determining that jurisdiction existed as to both individual defendants, the United States Supreme Court relied on none of the separate and independent contacts between the individual defendants and the forum state of California. *See id.* at 785–86 n.4 & 787 n.6. Instead, it premised jurisdiction over both defendants on the "'effects' of their Florida conduct in California." *Id.* at 789. However, the Court was careful to distinguish this "effects" test from that "foreseeable effects" test earlier discredited in World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 295–97 (1980). Unlike the random foreseeability that a product might enter the forum state of Oklahoma in *World-Wide Volkswagen Corp.*, the conduct of South and Calder, and hence its effect, were targeted at plaintiff Shirley Jones in the forum State of California:

> [P]etitioners are not charged with mere untargeted negligence. Rather, their intentional, and allegedly tortious, actions were expressly aimed at California. Petitioner South wrote and petitioner Calder edited an article that they knew would have a potentially devastating impact upon respondent. And they knew that the brunt of that injury would be felt by respondent in the State in which she lives and works and in which the National Enquirer has its largest circulation.

Calder, 465 U.S. at 789–90. Thus, the targeted effect of the conduct of South and Calder in the instant case was similar to that of the defendant insurer in McGee v. International Life Ins. Co., 355 U.S. 220 (1957) discussed *supra* note 79 and accompanying text.

disappointed with the ensuing decision in *Hanson v. Denckla*.[86] The amenability issue in that case centered around the contacts between a Delaware trust company and the forum state of Florida. Although the trust company had no office in Florida, maintained no general agents in Florida, administered no trust assets in Florida, and solicited no business in Florida, it did mail income to the settlor, Mrs. Donner, in Florida. It also received instructions from her, while she was domiciled in Florida, concerning the exercise of the powers of appointment under the trust. These contacts with the forum state of Florida, however, did not qualify as minimum contacts because they arose simply by virtue of the unilateral activity of the settlor in moving from Pennsylvania to Florida. The Court noted that "[t]he unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum state. . . . [I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."[87] As distinct from *McGee*, where the defendant's insurance solicitation targeted an individual within the forum state, *Hanson* dealt with a pure customer transfer. The relationship of the trustee to the trust had been fully established before Mrs. Donner moved to Florida. Moreover, the claim was not related to the trustee's activities within the forum state because the primary substantive question to be decided by the state court incident to the claim was *not* the propriety of the exercise of the power of appointment but the validity of the trust, and that trust had been fully created in Pennsylvania, not in Florida. The rule of *Hanson* thus identified a particular due process limitation on the exercise of personal jurisdiction that had never before been articulated. The *Hanson* Court also recognized that in determining the overall fairness (*i.e.*, quality/convenience) of subjecting a defendant to jurisdiction in the forum state, it is essential that the connection to the state be the foreseeable result of the defendant's own conduct—not simply the unilateral activity of the plaintiff or some tangential third party. Thus, voluntariness and foreseeability, not physical impact, became the preeminent considerations for due process purposes.

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[86] 357 U.S. 235 (1958). States such as Wisconsin treated the decision in *Hanson* more as an aberration confined to its own facts. As the Wisconsin Supreme Court noted in Hasley v. Black, Sivalls & Bryson, Inc., 235 N.W.2d 446, 457 (Wis. 1975): "*Hanson* is best viewed as an application of the due process standard to a particular factual situation . . . . This view would also qualify the statement in *Hanson* that: '[I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.'" (citations omitted) (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958)).

[87] *Hanson*, 357 U.S. at 253.

Without *Hanson's* purposeful-activity limitation upon the nonresident trustee's amenability, the trustee would be amenable anywhere its client chose to relocate, unless it made a decision to sever ties with that client. Moreover, such a defendant could never assess its amenability by gauging the impact of its own activities, since its activities would not control. *Hanson*, however, stood for twenty years as the only case in which the Supreme Court denied a state's efforts to exercise in personam jurisdiction, and came to be regarded as "a curiosity,"[88] largely because its restriction on jurisdiction was justified as "a consequence of territorial limitations on the power of the respective States."[89]

Then, in 1978, the Supreme Court decided the case of *Kulko v. Superior Court*,[90] another minimum contacts case that analyzed activities that might support amenability consistent with due process of law. That case involved an attempt by a divorced California mother to establish a Haitian divorce decree incorporating a New York custody agreement as a California judgment, so as to modify its custody and support provisions within the state of California. The California state courts had upheld jurisdiction over the New York father either because he had "caused an effect in the State"[91] of California when he permitted a daughter to move to California permanently to reside with her mother and consented to the son's relocation there, or because, under the circumstances, it was fair and reasonable for the California courts to exercise personal jurisdiction.[92]

This case was significant because it posed the question that had troubled courts and commentators since *McGee* and *Hanson* were decided. Under *McGee's* general fairness approach, the California courts seemed to be correct. Although the defendant father had no personal contact with California, he was nevertheless a party to an arrangement with a substantial California connection: a parent-child relationship with children residing in California. The California courts believed that the defendant had purposefully availed himself of the laws of the State of California because he had caused certain "effects" within the State of California which resulted from activity outside the state. The California courts relied upon a "foreseeable effects" test to satisfy the purposeful, forum-related activity requirement of *Hanson*. In particular, the defendant had actively consented to his daughter's living in California, had bought her plane ticket to live there and had derived a financial benefit by virtue of his daughter's

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[88] *See* Stewart Jay, *"Minimum Contacts" as a Unified Theory of Personal Jurisdiction: A Reappraisal*, 59 N.C. L. REV. 429, 439 (1981); *see also* Martin B. Louis, *The Grasp of Long Arm Jurisdiction Finally Exceeds Its Reach: A Comment on* World-Wide Volkswagen Corp. v. Woodson *and* Rush v. Savchuk, 58 N.C. L. REV. 407, 408 (1980).

[89] *Hanson*, 357 U.S. at 251.

[90] 436 U.S. 84 (1978).

[91] *Id.* at 89.

[92] *Id.*

presence in California for nine months out of the year. When reviewed by the United States Supreme Court, however, these contacts were deemed insufficient to establish the defendant's amenability in California because they arose out of the defendant's personal, domestic relations: "A father who agrees, in the interests of family harmony and his children's preferences, to allow them to spend more time in California than was required under a separation agreement can hardly be said to have 'purposefully availed himself' of the 'benefits and protections' of California's laws."[93] Moreover, the Supreme Court noted that the effects test, on which California had relied, derived from the Restatement of Conflict of Laws, which covers only wrongful activity outside the state causing injury within the state, or commercial activity affecting state residents.[94] Furthermore, the mother's claim was adjudged unrelated to the father's contacts with the forum state of California because, as in *Hanson*, the separation and custody agreement, which had been incorporated into the Haitian divorce decree, was wholly devised before the plaintiff ever entered the forum state of California.[95]

The *Kulko* decision can be easily rationalized by suggesting that there are some contacts which are of a purely personal nature from which a defendant derives no economic or commercial benefit. These activities are relatively protected by First Amendment privacy interests and, in the absence of some specific statute expressing the state's overriding concern, the state has a relative disinterest in such activities. Thus, *Kulko* accepts the *Hanson* principle that in order for the exercise of a state's jurisdiction over a particular defendant to be fair and reasonable, there must be some contact with the forum state by which the defendant purposefully avails itself of the laws and protections of the forum state, which is not simply the unilateral activity of a resident who claims some relationship to the defendant. Furthermore, matters such as custody between separated or divorced parents, in the absence of a decree in that state or other statute evidencing state interest and hence a high quality, are relatively protected by First Amendment privacy guarantees. These are matters in which the state interferes only hesitantly. Thus, to a great extent, there evolved a model for in personam jurisdiction which was at once rational, constitutionally limited, and flexible.

B. World-Wide Volkswagen Corp.: *The Make-A-Market Test*

The evolution of in personam jurisdiction continued coherently with the 1980 Supreme Court decision in the landmark case *World-Wide Volkswagen*

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[93] *Id.* at 94.
[94] *Id.* at 96.
[95] *Id.* at 97.

Corp. v. Woodson,[96] a product liability suit to redress injuries caused by defective design and placement of the Audi gas tank. In that action, the plaintiffs had joined as defendants the German auto manufacturer (Audi NSU Auto Union Aktiengesellschaft), the importer (Volkswagen of America, Inc.), the regional distributor serving the northeast tri-state area of New York, New Jersey and Connecticut (World-Wide Volkswagen Corporation) and the New York retail dealer (Seaway Volkswagen, Inc.), from whom plaintiffs (the Robinsons) had purchased the automobile in question. Plaintiffs were en route from New York to Arizona when they were hit by another vehicle in Oklahoma causing their car to explode and burn.

Of the defendants named, only the regional distributor (World-Wide Volkswagen) and the retail dealer (Seaway) challenged the court's personal jurisdiction. Each entered a special appearance and argued that due process was violated in requiring it to appear and defend a tort action in Oklahoma when there existed no contacts between the particular defendant and the forum state of Oklahoma.

In determining that the two defendants in question were amenable, the Oklahoma Supreme Court utilized the foreseeable effects rationale, *i.e.*, the defendants should have foreseen the possibility of a harmful effect in the forum state because of the mobility of automobiles and because of the substantial economic benefit each derived from goods ultimately used and consumed in the state of Oklahoma. The United States Supreme Court, however, rejected that analysis and announced that foreseeability alone was not sufficient to create amenability.[97] The Court noted that it was "not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there."[98] The Court then formulated a test to assess whether defendants had purposefully availed themselves of the laws and protections of the forum state: do they make an effort to serve, directly or indirectly, the market for their product in the forum state?[99] In the words of the Court,

> [I]f the sale of a product of a manufacturer or distributor such as Audi or Volkswagen is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, *directly or indirectly*, the market for its product in other States, it is not unreasonable to subject it to suit in one of

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[96] 444 U.S. 286 (1980).
[97] *Id.* at 295.
[98] *Id.* at 297.
[99] *Id.*

> those States if its allegedly defective merchandise has there been the source of injury to its owner or to others.[100]

This make-a-market theory, as tested by the downstream theory of commerce explained below, has become and should remain the talisman for constitutional assessment. It accounts for the common-sense reality of product distribution in the marketplace and accommodates the interests inherent in the exercise of jurisdiction.[101]

In concluding that no market for their product was intended by the defendants in Oklahoma, the Court observed, "[n]or does the record show that they regularly sell cars at wholesale or retail to Oklahoma customers or residents or that they indirectly, through others, serve or seek to serve the Oklahoma market."[102] Volkswagen of America and Audi, of course, did not challenge amenability because of the likelihood that they would have been amenable in Oklahoma through a distributor or dealer who exploited and served the Oklahoma market. Most significant to the assessment here, however, is that the Court suggested a methodology to ascertain whether a defendant has attempted to make a market in a particular forum. The Court looked to the activities of the people to whom the defendant sold its product, *i.e.*, the downstream market.[103] The process begins, therefore, by looking at the conduct of the particular defendant, whose amenability is disputed, proceeding down through the commercial chain, culminating with placement of the product in the forum. As long as the product finds its way into the forum as a result of the commercial activity of those entities to whom the defendant sells

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[100] *Id.* (emphasis added).

[101] *See infra* subpart I.B.

[102] World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 295 (1980).

[103] *Id.* at 297–98. At least one other commentator has earlier advocated this approach by reference to a "vertical stream of commerce traveling from manufacturer to purchaser." *See* Burney T. Durham, Note, *Long Arm Jurisdiction and Products Liability: Beyond World-Wide Volkswagen*, 11 MEM. ST. U. L. REV. 351, 370 (1981). The utility of such a stream of commerce as contemplated by the Note author above, however, was to locate those states within which minimum contacts might exist with respect to any prior handler of the product in the chain: "Any state through which the product passes during this chain should possess the requisite minimal [sic] contacts to sustain a suit against any prior handler of the product whether it be manufacturer, distributor, or retailer. Along this entire vertical chain, any prior handler of the product can be said to have purposefully availed itself of the privilege of conducting activities in those states through which the product passes." *Id.* The utility of the stream of commerce to the present author, on the other hand, is to assess the purposefulness of activities directed at a given forum by a particular defendant within the stream of commerce whose amenability is challenged. The "stream of commerce," as thus articulated, provides a methodology for assessing compliance under the Brennan approach advocated in Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 116–21 (1987) (Brennan, J., concurring).

its product, the stream of commerce continues, and defendant will have made a market in the particular forum.[104]

The break in the stream of commerce in *World-Wide Volkswagen Corp.* sufficient to defeat amenability was again quite logical—it was the consumer activity of the Robinsons. What differentiated the Robinsons from the Oklahoma distributor and the Oklahoma dealer, who were also customers of Audi and Volkswagen, is that the Robinsons were *consumer* customers, not commercial customers. Hence, their actions in moving the automobile out of New York constituted unilateral activity which, consistent with *Hanson v. Denckla*, could not satisfy the due process requirement of contact with the forum state.

Thus, under *World-Wide Volkswagen Corp.*, the idea seemed clear: so long as the person to whom the defendant sells is not a consumer customer, whose activities in moving the product into the forum state would necessarily be unilateral, the stream of commerce continues and creates a purposeful relationship between the defendant and the forum state. With a sale to the consumer customer, however, the stream of commerce ends. Thus, when Seaway sold its automobile to the consumer customer Robinson in New York, the product was taken out of the stream of commerce in New York. While Seaway and World-Wide Volkswagen certainly would have been amenable in

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[104] It is this analysis which differs from those "vertical stream of commerce" theories previously announced. *See supra* note 103. Rather than conferring an entity status on the entire chain of distribution such that any distributor within the chain is necessarily amenable in the forum state if one of them is, this author suggests that the stream of commerce analysis is only useful to assess the purposeful contacts between a given defendant and the forum state. It is that focus which distinguishes the majority opinion in *World-Wide Volkswagen Corp.* from the dissents of Justices Brennan, Marshall and Blackmun, who appear to advocate an "upstream" theory of commerce, *i.e.*, if any distributor in the chain of commerce reaches the particular forum market, then everyone in the chain will be amenable. Thus, Justice Brennan noted the qualitative value of "a network of other related dealerships with their service departments" operating "throughout the country under the protection of the laws of the various States," which "enhances the value of petitioners' businesses by facilitating their customers' traveling." *World-Wide Volkswagen Corp.*, 444 U.S. at 307 (Brennan, J., dissenting). Likewise, Justice Blackmun notes that there is nothing inherently "unfair" in upholding Oklahoma jurisdiction over the Audi manufacturer and importer, as well as the New York distributor and the New York dealer, because "[a]ll are in the business of providing vehicles that spread out over the highways of our several States." *Id.* at 318 (Blackmun, J., dissenting). This author submits that under the majority view, a court may not look to the commercial conduct of the person *from* whom an object is distributed, but only to the commercial conduct of the persons *to whom* an object is distributed in order to establish a purposeful relationship between a given defendant in the commercial chain and the forum state. The chain of commerce analysis must always begin with the defendant whose amenability is questioned, and not with some other producer higher up in the chain.

New York, the stream of commerce ended there. As a result, there could be no amenability of the subject defendants in Oklahoma: "There is no evidence of record that any automobiles distributed by World Wide are sold to retail customers outside this tri-state area [of New York, New Jersey and Connecticut]."[105] Seaway, the retail dealer, could not be said to have conducted activities within the forum state of Oklahoma because the relationship of its customer (Robinson) to the forum state of Oklahoma was of utterly no commercial concern. Thus, the decision in *World-Wide Vokswagen Corp.* is also consistent with the decision in *Kulko*.[106] The result is that unilateral activity of a consumer customer removes the product from the stream of commerce, *i.e.*, takes the product out of the ordinary course of business, for purposes of ascertaining minimum contacts. Such a decision again makes a great deal of sense because the reality is that, once purchased, a product travels anywhere and everywhere at the whim of the consumer.

A second important feature of the opinion in *World-Wide Volkswagen Corp.* is that it revives the concept of federalism or the principle of extraterritoriality (power principle), as originated in *Pennoyer v. Neff*. As the Court noted, "we have never accepted the proposition that state lines are irrelevant for jurisdictional purposes, nor could we, and remain faithful to the principles of interstate federalism embodied in the Constitution."[107] Again, "the reasonableness of asserting jurisdiction over the defendant must be assessed 'in the context of our federal system of government.'"[108] The Court noted that it was a mistake to assume that the trend away from *Pennoyer* heralded the demise of all restrictions on the personal jurisdiction of state courts. Those restrictions are necessary as a consequence of the power principle, which still remains largely intact as a matter of historical precedent.[109] It is for this reason that foreseeability alone does not work; it

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[105] *World-Wide Volkswagen Corp.*, 444 U.S. at 298.

[106] The *World-Wide Volkswagen Corp.* stream of commerce analysis is also consistent with the targeted effects test of Calder v. Jones, 465 U.S. 783 (1984); *see also supra* note 85. Under that test, the defendant writer and editor had engaged in purposeful activity within the forum state of California when they targeted the particular California plaintiff, Shirley Jones. When measured, however, by the make-a-market test, it is easy to see that the article produced by South reached the State of California through a stream of commerce directed at the forum state: South (writer) to Calder (editor) to National Enquirer, Inc. to California distributor. Thus, the two theories consistently measure the same end.

[107] World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 293 (1980).

[108] *Id.* at 293–94.

[109] The opinion of Justice Scalia in the recent decision of Burnham v. Superior Court, 495 U.S. 604 (1990), reaffirming the constitutionality of transient jurisdiction, also reaffirms reliance on the *Pennoyer* principles "traditionally followed by American courts in marking out the territorial limits of each State's authority" in assessing compliance with the Due Process Clause of the 14th Amendment. *Id.* at 609.

conflicts with the power principle. A pure reasonableness test based solely on foreseeability would render virtually every defendant amenable in a plaintiff's home state, especially with the breadth of today's commercial markets. The result of *World-Wide Volkswagen* appears to be that in cases of indirect contact, due process recognizes the amenability of an absent defendant if that defendant's activities evidence an intent to make a market in the forum, and the plaintiff suffers injury to person or property as a result of that defendant's commercial activity.[110]

Beyond *World-Wide Volkswagen*, there is one additional case which bears mention. Although typically considered precedential on the subject of general amenability or general in personam jurisdiction, *Helicopteros Nacionales de Colombia, S.A. v. Hall*[111] offers notable comment on specific in personam jurisdiction as well. More particularly, it stands as a reminder to plaintiffs' counsel that they can concede too much too soon.

Helicopteros concerned a wrongful death action commenced by plaintiff-survivors and representatives of the decedent employees of a Peruvian consortium, Corsorcio. The decedent employees were United States citizens hired to construct a pipeline in Peru. Consorcio was the alter ego of a Texas joint venture group (Williams-Sedco-Horn) and was formed specifically to contract with the Peruvian government for the construction of the pipeline.[112] It was named a co-defendant together with Helicopteros (Helicol), a Columbian corporation with its principal place of business in Bogota. Helicol owned helicopters and engaged in transporting Consorcio personnel to and from the Peruvian construction site. Helicol and Consorcio had entered into a contract whereby Helicol would transport the Consorcio personnel, materials, and equipment in and out of the construction area. The action was commenced in the Texas courts when one of Helicol's helicopters crashed, killing the United States citizens. The plaintiffs likely chose Texas because they had the best chance of obtaining personal jurisdiction over Helicol in Texas, short of suing the company in Bogota.

Looking at the contacts between Helicol and the state of Texas, the Supreme Court assessed them as follows: (l) Helicol sent Restrepo, its chief executive officer, to Houston to negotiate the terms of the contract, which was executed in Peru; (2) Helicol purchased eighty percent of its fleet, spare parts and accessories ($4 million) from a Fort Worth company, Bell Helicopter Co.;

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[110] This make-a-market theory is reflected in the statutes of states such as Wisconsin, whose tort long-arm requires either solicitation or service activities carried on within the state or the presence of products, materials or things "used or consumed within this state *in the ordinary course of trade.*" WIS. STAT. § 801.05(4)(b) (1992) (emphasis added).

[111] 466 U.S. 408 (1984).

[112] Peruvian law forbade construction of the pipeline by any non-Peruvian entity. *See Helicopteros*, 466 U.S. at 410.

(3) Helicol sent pilots to Fort Worth for training and to fly helicopters from Fort Worth to Peru; (4) Helicol sent management and maintenance personnel to Fort Worth for technical training; and (5) Helicol received payments from the consortium, which were drawn on a Houston bank.

Unfortunately, the plaintiffs conceded the entire issue of specific in personam jurisdiction when they agreed that their claims against Helicol did not "arise out of," and were not "related to" Helicol's activities within the State of Texas.[113] The parties thus restricted the issue before the Supreme Court to one of general amenability, which necessitated defendants' continuous and systematic contacts or continuous and high quality contacts with the State of Texas. Following counsel's lead, the Supreme Court was careful to "assert no view" with respect to the relationship between plaintiffs' cause of action and Helicol's contacts with the State of Texas.[114] With the issue of amenability thus narrowly confined, the Supreme Court proceeded to examine *ad seriatim* five classes of contacts between Helicol and the State of Texas, finding none sufficient to satisfy the "continuous and systematic" nature of general amenability, as earlier defined by the landmark case of *Perkins v. Benguet Consolidated Mining Co.*[115]

Asahi Metal Industry Co. v. Superior Court of California,[116] on the other hand, is the latest calculated pronouncement of the Supreme Court on the subject of specific amenability sufficient to confer long-arm jurisdiction. The action was commenced in the California state courts as a products liability suit by an injured plaintiff whose motorcycle went out of control following a tire blowout on a California interstate highway. The California plaintiff was injured and his passenger-wife was killed. Plaintiff alleged that the accident was caused by a sudden loss of air and an explosion in the rear tire which was in turn caused by a defective tire, tube and sealant. Plaintiff's complaint named, among

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[113] *Helicopteros*, 466 U.S. at 415.

[114] *Id.* at 415 n.10.

[115] 342 U.S. 437 (1952). That case involved two stockholder actions brought against the defendant Philippine mining corporation in the state courts of Ohio which were unrelated to the corporation's activities in that state. The issue thus being one of general amenability, the United States Supreme Court determined that the corporation was amenable within the Due Process Clause of the Fourteenth Amendment because it carried on "a continuous and systematic, but limited, part of its general business." *Id.* at 438. Such contacts included maintenance of a corporate office, directors' meetings and company files by the president, general manager and principal stockholder of the defendant company within the forum state of Ohio during the Japanese occupation of the Philippine Islands; correspondence and distribution of salaries from such office as well as the supervision of policies dealing with the rehabilitation of the corporation's Philippine properties; use and maintenance of Ohio bank accounts bearing corporate funds, and engaging an Ohio bank to act as transfer agent for corporate stock. *Id.* at 447–48.

[116] 480 U.S. 102 (1987).

others, Cheng Shin Rubber Industrial Co. (Cheng Shin), the Taiwanese manufacturer of the tube. Asahi Metal Industry Co. Ltd. (Asahi), the manufacturer of the tube valve assembly, was not named as a defendant by the California plaintiff. It was joined instead by Cheng Shin, which filed a third-party complaint seeking indemnification.[117]

Asahi was a Japanese corporation, which manufactured tire valve assemblies in Japan and sold them to Cheng Shin and to several other tire manufacturers for use as components in finished tire tubes. Asahi's sales to Cheng Shin took place exclusively in Taiwan. Cheng Shin in turn bought and incorporated into its tire tubes the Asahi tire valve assemblies, which products then were incorporated into cycles that were eventually distributed in California. Plaintiff's claims against Cheng Shin and the other defendants were settled and dismissed prior to trial, leaving unresolved only Cheng Shin's indemnity action against Asahi.

In terms of a *World-Wide Volkswagen Corp.* make-a-market or stream of commerce analysis, the chain of commerce for distribution of the defective valve assembly was as follows: Asahi Metal Industries (manufacturer of the tube valve assembly) to Cheng Shin (manufacturer of the tire tube) to the motorcycle manufacturer to the California cycle retailer.

Defendant Asahi attacked the California court's personal jurisdiction over it by moving to quash service of the summons. The Superior Court of California found personal jurisdiction, stating that it was not unreasonable for Asahi, which did business on an international scale, to defend claims of defect on an international scale. The California Court of Appeals, however, determined that no personal jurisdiction existed because it would be unreasonable to require Asahi to appear and defend in California solely on the basis of an ultimately realized foreseeability that the product containing its component part would be sold in California. The California Supreme Court, adopting the stream of commerce theory of *World-Wide Volkswagen Corp.*, reversed, ruling that Asahi's intentional act of placing its components into the stream of commerce, coupled with awareness that some of the parts would find their way into California,[118] was sufficient to render it amenable to the California courts. Thus, Asahi's intentional act of placing its component parts into the stream of commerce by delivering the components to Cheng Shin in Taiwan, coupled with Asahi's awareness that some of the components would find their way to California, was sufficient to support the exercise of personal jurisdiction. As

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[117] *See* Brief for Petitioner at 2-3, Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102 (1987) (No. 85-693).

[118] The affidavit of a Cheng Shin manager, whose duties included the purchase of component parts, averred that Asahi was fully aware that valve stem assemblies sold to Cheng Shin would eventuate in placement throughout the United States and particularly in California. *Asahi*, 480 U.S. at 107.

thus described, the facts are representative of those instances in which a manufacturer indirectly rather than directly makes a market in the forum state. Recall that the language of *World-Wide Volkswagen Corp.* premised amenability upon "the efforts of the manufacturer or distributor to serve, *directly or indirectly*, the market for its product in other States."[119] It is this idea of indirectly making a market that the O'Connor plurality seems to have eliminated in *Asahi*, and in doing so, it has severely constrained the substantive law of strict products liability.

C. *The O'Connor Plurality in* Asahi*: Abrogation of "Indirectly" Making a Market as a Measure of Minimum Contacts*

Consistent with *World-Wide Volkswagen Corp.*, the O'Connor plurality in *Asahi* began its analysis of the stream of commerce theory of personal amenability by acknowledging that the constitutional test of specific jurisdiction is minimum contacts, and that minimum contacts under the Due Process Clause requires some act by which the defendant purposefully avails itself of the laws and protections of the forum state.[120] It also accepted the consumer customer analysis of *World-Wide Volkswagen Corp.* by pointing out that a consumer's unilateral act of bringing a defendant's product into the forum state is not a sufficient basis for jurisdiction under *Hanson v. Denckla*.[121]

From that point on, however, the views of Justices O'Connor, Rhenquist, Powell and Scalia diverge from those of Justices Brennan, White, Marshall and Blackmun on an interpretation of the operation of the stream of commerce theory.[122] The O'Connor plurality points out that since the decision in *World*

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[119] *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980) (emphasis added).

[120] *Asahi*, 480 U.S. at 108–09.

[121] *Id.* at 109.

[122] Justice Stevens refused to join the opinion of either segment of the Court, concluding instead that an interpretation of the stream of commerce theory was unnecessary to the decision since both segments had concluded that the contacts of Asahi were qualitatively insufficient to support jurisdiction. Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 121–22 (1987) (Stevens, J., concurring in part and concurring in the judgement). Having said this, however, Justice Stevens went on to assert that the test formulated by the O'Connor plurality, even if appropriate, had been misapplied. *Id.* at 122. The adequacy of the defendant's contacts with the forum could not be assessed, he argued, by reference to some "unwavering line" between "mere awareness" and "purposeful availment." *Id.* Instead, that assessment would be affected by the "volume, the value and the hazardous character of the components." *Id.* In this case, he suggested that the demands of due process could be satisfied by the defendant's contacts which involved a "regular course of dealing that results in deliveries of over 100,000 units annually over a period of several years." *Id.*

Wide Volkswagen Corp., lower courts have been split on the application of the stream of commerce theory. The nature of the split is that some courts have understood the Due Process Clause, as interpreted by *World-Wide Volkswagen Corp.*, to allow the exercise of personal jurisdiction premised merely on the fact that a defendant has intentionally placed its product in the stream of commerce—a theory to which the Brennan plurality adheres.[123] Other courts, however, have required a defendant to do something more purposefully directed at the forum state. The latter courts require something more because they equate placement of the product in the stream of commerce with mere foreseeability, even though such placement of the product constitutes an intentional act. Justice O'Connor, adopting the position of these latter courts, required something more—some additional conduct, which she described as follows:

> Additional conduct of the defendant may indicate an intent or purpose to serve the market in the forum State, for example, designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State.[124]

Under these criteria, a component parts manufacturer would be amenable only in those states where it actually sold its parts to the final product assembler, unless it "create[d], control[ed], or employ[ed] the distribution system that brought"[125] its product into the forum state. In short, O'Connor would require in almost all cases some privity between the parties of the distribution system and the component parts manufacturer before she would attribute purposefulness to the commercial activity of the component parts manufacturer. She thus effectively abrogates the concept of an indirect market by terming purposeful only contact in or directly aimed at a specific forum.

In terms of the specific facts of *Asahi*, the stream of commerce would necessarily stop at Cheng Shin. The stream of commerce would continue beyond the final product assembler *only* if the component parts manufacturer sought to establish some form of direct market for its product within the forum state. Thus, a component parts manufacturer like Asahi can insulate itself from tort amenability by intentionally utilizing an assembler whose distribution process it knows will reach a specific market, so long as it does not control the distribution scheme of that assembler.

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[123] *Asahi*, 480 U.S. at 117.
[124] *Id.* at 112.
[125] *Id.*

Likewise, it appears that a component parts manufacturer could insulate itself by relying exclusively upon a single network of independent distributors which it knew reached specific markets.[126] This was clearly not the intent of *World-Wide Volkswagen Corp.*. In terms of available redress, the injured plaintiff in *Asahi* would be able to sue Asahi only in Taiwan or Japan, unless Asahi was generally amenable somewhere else in the United States. In view of these implications, the O'Connor analysis is troublesome and troubling—troublesome because it effectively abrogates a right of action for many products liability plaintiffs against component part manufacturers; troubling because it was unnecessary to any decision regarding the defendant Asahi's amenability on a claim for indemnification brought by the defendant and third-party plaintiff Cheng Shin.

This latter point is fully demonstrated by the analysis adopted by the entire Court in Part IIB of the *Asahi* opinion, for it is that analysis which identifies the underlying problem with Asahi's amenability. The real problem with Asahi's amenability appears not to have been a lack of purposeful contacts with the State of California—it was instead the *quality* of those contacts; that is, the State of California had a relative disinterest in the indemnity dispute between two foreign nationals. Furthermore, although the Supreme Court was reluctant to specifically identify it as such, the Court also appears to have been influenced by the unrelatedness of the surviving indemnity claim to Asahi's contacts with California.

As noted earlier,[127] the Supreme Court in *International Shoe* focused on two quality indicators which would elevate a given defendant's level of contacts: state interest in regulating the conduct which gave rise to the cause of action and the convenience to the defendant of litigating in the chosen forum.[128] The *Asahi* analysis in Part IIB of the opinion is consistent with both of those factors. Thus, the Court is found discussing the burden on the defendant (*i.e.*, inconvenience) and the interests of the forum state in providing relief.

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[126] *Cf.* Hasley v. Black, Sivalls & Bryson, Inc., 235 N.W.2d 446 (Wis. 1975). In a precedent-setting opinion concerning the amenability of a component parts manufacturer, decided before *World-Wide Volkswagen Corp.*, the Wisconsin Supreme Court observed that there could come a point at which the intervention of so many parties between the component parts manufacturer and the retailer would make the imposition of authority over the component parts manufacturer unfair. On the other hand, the exercise of power over such a defendant would be fair when there existed "a strong relationship between the entities" or when "the producer relie[d] solely on a single network of independent distributors to reach the actual consumer."

[127] *See infra* pp. 417–20.

[128] *See infra* pp. 419.

In response to the issue of convenience, the Court points out that the burden on the defendant Asahi was severe because Asahi was being required to submit its indemnity dispute with Cheng Shin to a foreign nation's judicial system.[129] When analyzing the state interest factor, although the Supreme Court acknowledged California's interest in "'protecting its consumers by ensuring that foreign manufacturers comply with the state's safety standards,'"[130] it also noted that:

> In the present case . . . the interests of the plaintiff and the forum in California's assertion of jurisdiction over Asahi are slight. All that remains is a claim for indemnification asserted by Cheng Shin, a Taiwanese corporation, against Asahi. The transaction on which the indemnification claim is based took place in Taiwan; Asahi's components were shipped from Japan to Taiwan. Cheng Shin has not demonstrated that it is more convenient for it to litigate its indemnification claim against Asahi in California rather than in Taiwan or Japan.[131]

Essentially, the Supreme Court suggests that whatever interest the State of California might have had in affording its injured citizens a forum for relief against foreign defendants who had caused harm to them is of little or no consequence when that underlying claim for relief has settled. Put another way, the arguments in favor of the California consumer lose force when they are championed by Cheng Shin, a Taiwanese corporation, to support its indemnity claim against a Japanese corporation.[132] Had the plaintiff undertaken to litigate

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[129] Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 114 (1987).

[130] *Id.*

[131] *Id.* A majority of the Supreme Court in *Asahi* also remarked that California's legitimate interests in the dispute were "considerably diminished" because the plaintiff was not a California resident. *Id.* at 114.

[132] The Wisconsin Supreme Court encountered a similar dispute long before *World-Wide Volkswagen Corp.* or *Asahi* were decided. In the case of Hasley v. Black, Sivalls & Bryson, Inc., 235 N.W.2d 446 (Wis. 1975), discussed *supra* note 126, plaintiffs commenced an action in negligence and strict liability against the Texas component part manufacturer of an allegedly faulty "bull plug" (J.B. Smith Manufacturing Company) and the co-defendant product assembler of an apparatus known as a "horizontal dust scrubber" (Black, Sivalls & Bryson). Smith answered the complaint denying liability and moved to dismiss for want of personal jurisdiction. Although the co-defendant Black responded to the motion to dismiss, plaintiffs did not. Like the Supreme Court in *Asahi*, the Wisconsin Supreme Court considered that a state's interest in the action for purposes of deciding whether the extension of Wisconsin's tort long arm statute over Smith comported with due process. The court noted that while a state's interest in affording its injured citizens a forum for relief would ordinarily be of significant weight, that interest was diminished when the plaintiffs themselves did not assert it:

its products liability claim against the component parts manufacturer Asahi, Asahi's contacts in placing its products in the stream of commerce that eventuated in California would clearly have been of a quality sufficient to support the related claim.[133] In that instance, California would have had a substantial interest in allowing the injured California plaintiff to pursue his claim for redress by the Court's own assessment.

The Supreme Court also appears concerned that the indemnity claim was decidedly *unrelated* to Asahi's contacts with the forum state of California and that the petitioner and third-party plaintiff Cheng Shin was not a California resident,[134] thereby reducing the interest of the State of California in hearing

> The desire in Wisconsin for the protection of the consumer from defective products may be as strong as the desire in California for protection of its citizens from insurance industry abuse. . . .
>
> Such a factor may ordinarily be of significant weight. In this case, however, the plaintiffs have chosen an indifferent posture and have not responded to Smith's assertion that jurisdiction is lacking. Whether they feel that their interests were perhaps best protected by their opponent Black, or whether they no longer deem Smith's presence in the suit a necessity cannot be determined. *The arguments in favor of the Wisconsin consumer lose force in the case when they are championed by Black, a Texas corporation, against its cross-complaining co-defendant.*

Hasley, 235 N.W.2d at 459 (emphasis added).

[133] The author is not alone in this view. Professor Andreas Lowenfield of the New York University School of Law, who helped in the preparation of an amicus brief for British trade interests in support of Asahi Metal Industries, "predicted that the Court's outcome would have been different if the claim against Asahi Metal was 'by the guy who fell off the motorcycle.'" David O. Stewart, *Shortening California's Long Arm*, 73 A.B.A. J. 45, 46 (1987). Professor Lawrence Dessem of the University of Texas Law School concurred. *Id.*

[134] In Part IIB of the *Asahi* opinion, joined by a majority of the Court, Justice O'Connor writes: "[b]ecause the plaintiff is not a California resident, California's legitimate interests in the dispute have considerably diminished." Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 114 (1987). It should be noted that the Supreme Court was not referring to the plaintiff Gary Zurcher in this statement. In point of fact, the plaintiff Gary Zurcher and his deceased wife were both residents of California. *See* Asahi Metal Indus. Co. v. Superior Court, 216 Cal. Rptr. 385, 387 (Cal. 1985). Rather, the Court appears to have meant the third-party plaintiff Cheng Shin, the Taiwanese manufacturer of the tire tube, whose indemnity claim alone remained. Thus, it is not the plaintiff's lack of residence which could have informed the Court's analysis.

Furthermore, the Supreme Court had earlier commented in Keeton v. Hustler Magazine, 465 U.S. 770 (1984), that a plaintiff's lack of residence in the forum state was irrelevant to the issue of a given defendant's amenability. In *Keeton*, the plaintiff commenced a multi-state libel action in New Hampshire, despite the fact that she was a resident of New York. Her only connection with New Hampshire was the circulation there of some 10,000 to 15,000 copies of a magazine she assisted in producing. *Id.* at 772. The Court of Appeals for the First Circuit had affirmed the district court's order dismissing the action against Hustler for want of personal jurisdiction, noting that the "petitioner's lack of contacts with New Hampshire rendered the State's interest in redressing the tort of libel to

the indemnity dispute. Since even impleaded defendants must be amenable in the forum state in order to be subject to suit,[135] the relatedness of the claim to Asahi's contacts likewise provided another basis on which the Supreme Court could have dismissed the indemnity claim against Asahi without construing (or misconstruing) the stream of commerce test.

Thus, it is apparent that Asahi's amenability fell, not because of its lack of purposeful conduct in placing its product in the stream of commerce in California, but because there was insufficient state interest in deciding the indemnity dispute once the underlying products liability claim was resolved, and because Asahi's contacts with the State of California were not related to the indemnity claim filed against it by Cheng Shin. That is the basis on which *Asahi* should have been decided. The O'Connor plurality has misconstrued what the case was about and appears now to have recreated a wall of the "citadel"[136] for component parts manufacturers—the plaintiff's hurdle termed "jurisdictional privity" in this Article.

The position of the O'Connor plurality in *Asahi* likewise directly confronts the landmark decision of the Illinois Supreme Court in *Gray v. American Radiator & Sanitary Corp.*,[137] cited in *World-Wide Volkswagen Corp.* to support a principle of amenability analogous to the stream of commerce theory.[138] The facts of the *Gray* case disclose that defendant Titan Valve, an Ohio corporation, had sold its products (radiator valves) to American Radiator & Standard Sanitary Corporation in Pennsylvania. The valves were

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petitioner too attenuated for an assertion of personal jurisdiction over respondent." *Id.* at 773. As the Supreme Court noted, however:

> The plaintiff's residence is not, of course, completely irrelevant to the jurisdictional inquiry. . . . Plaintiff's residence may well play an important role in determining the propriety of entertaining a suit against the defendant in the forum. *That is, plaintiff's residence in the forum may, because of defendant's relationship with the plaintiff, enhance defendant's contacts with the forum.* Plaintiff's residence may be the focus of the activities of the defendant out of which the suit arises. . . . But plaintiff's residence in the forum is not a separate requirement, and lack of residence will not defeat jurisdiction established on the basis of defendant's contacts.

Id. at 780 (emphasis added).

135 *See, e.g.*, 6 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1445 (2d ed. 1990); 3 JAMES W. MOORE AND RICHARD D. FREER, MOORE'S FEDERAL PRACTICE ¶¶ 14.18[2.-2], 14.28[1] (2d ed. 1992).

136 *See* Prosser, *supra* note 1.

137 176 N.E.2d 761 (Ill. 1961).

138 *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297–98 (1980) ("The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State.") (citing Gray v. American Radiator Std. Sanitary Corp., 176 N.E.2d 761 (Ill. 1961)).

incorporated intact into radiator heaters in Pennsylvania and made their way "in the course of commerce" into Illinois,[139] where one such radiator exploded, injuring Mrs. Gray. Unlike the *Asahi* plaintiff Gary Zurcher, Mrs. Gray sued as co-defendants both American Radiator and Titan Valve. American Radiator then cross-claimed for indemnification against Titan Valve. Mrs. Gray, however, continued to litigate her products liability claim against Titan Valve to trial.

What was remarkable about the *Gray* case in 1961 was that there had been no direct activity by Titan Valve of Ohio in the State of Illinois. Instead, thousands of valves were sold by Titan Valve to American Radiator in Pennsylvania. American Radiator, like Cheng Shin, was a separate and independent company in which Titan Valve had no control or interest. Thus Titan Valve occupied the same posture with regard to American Radiator that Asahi occupied with respect to Cheng Shin. Yet the Illinois Supreme Court found Titan Valve amenable in the State of Illinois.

Although utilizing a stream of commerce rationale to assess fairness, the Illinois Supreme Court articulated no *World-Wide Volkswagen Corp.* stream of commerce theory as the basis for its decision. Instead, it simply reasoned that "the use of such products in the ordinary course of commerce is sufficient contact with this State to justify a requirement that he [a defendant] defend here."[140] Thus, it found that the extension of the Illinois local tort long-arm statute over Titan Valve was consistent with due process. It also found, however, that the terms of the Illinois local tort long-arm statute were met since the tort was committed in Illinois. That is, there existed a local tortious act, by virtue of the fact that the "place of wrong is the place where the last event takes place which is necessary to render the [defendant] liable."[141] Since the last event was the injury, which occurred in Illinois, the court reasoned that the tort was in fact committed in Illinois.

The importance of *Gray* lay both in its determination that Titan Valve was amenable as well as its predictive policy language:

> Where the alleged liability arises, as in this case, from the manufacture of products presumably sold in contemplation of use here, it should not matter that the purchase was made from an independent middleman or that someone other than the defendant shipped the product into this State . . . .
>
> As a general proposition, if a corporation elects to sell its products for ultimate use in another State, it is not unjust to hold it answerable there for any damage caused by defects in those products. . . .[142]

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[139] *Gray*, 176 N.E.2d at 764.
[140] *Id.* at 766.
[141] *Id.* at 762–63.
[142] *Id.* at 766.

Thus, the Illinois high court reasoned that Titan Valve had indirectly engaged in activities of a minimum kind in that state which were constitutionally sufficient to support the exercise of personal jurisdiction over it by the Illinois courts. The result in *Gray* therefore coincided with the constitutional justification later articulated in *World-Wide Volkswagen Corp.* Of course, there is now serious question whether the *Gray* situation would survive O'Connor's stream of commerce analysis in *Asahi.*

More importantly, the decision of the Illinois Supreme Court in *Gray* was an attempt by that court to bring long-arm jurisdiction into harmony with the developing principles of products liability. In particular, it was important that Mrs. Gray, who was injured in Illinois, be allowed to pursue her claim for injury against the component part manufacturer Titan Valve—the only party who might be liable under negligence principles. In terms of product liability law, the Illinois Supreme Court did not want the artificial structure of the distribution or marketing chain to interfere with the substantial rights of its injured citizen. Essentially, the component parts manufacturer in *Gray* asserts a jurisdictional challenge which the court rejects by resorting to the tort principles later adopted in section 402A of the Restatement.

III. THE PRODUCTS LIABILITY DILEMMA UNDER *ASAHI*: A RIGHT WITHOUT A REMEDY

A. *The Origin and Intent of Restatement Section 402A*

A plaintiff who has suffered physical harm to person or property caused by a defective product has a choice of three legal theories under which to proceed: negligence in tort, strict liability for breach of warranty, and strict liability in tort.[143] Historically, the theories of tort negligence and strict liability in warranty limited liability of manufacturers whose products caused injury by requiring that the injured plaintiff and the defendant manufacturer be in privity of contract. The seminal case of *Winterbottom v. Wright,*[144] for example, was interpreted as authority for the proposition that no action would lie, even in tort, "for the misperformance of a contract of sale of a chattel in the first instance."[145] As courts increasingly adhered to that principle, the general rule evolved that "an original seller of goods was not liable for damages caused by their defects to anyone except his immediate buyer, or one in privity with

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[143] *See generally* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 101 (5th ed. 1984).

[144] 10 M. & W. 109, 152 Eng. Rep. 402 (1842).

[145] KEETON ET AL., *supra* note 143, § 96, at 681.

him."[146] This rule was supported by a policy determination that whatever the negligence of the manufacturer, the manufacturer was insulated by the intervening sale to a distributor or retailer.[147] Another policy supporting the rule could be found in the language of the *Winterbottom* decision itself:

> There is no privity of contract between these parties; and if the plaintiff can sue, every passenger, or even any person passing along the road, who was injured by the upsetting of the coach, might bring a similar action. Unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit, would ensue.[148]

Thus, a concern prevailed that it would be too burdensome to hold manufacturers and sellers responsible to persons whose identity they could not know.[149] Historically, therefore, a manufacturer could immunize itself from tort liability by making a contract for the sale or distribution of its product with some third party, which transaction intervened between the manufacturer and the consumer.

Likewise, early on, persons who suffered physical injury to person or property caused by a defective product seldom recovered on a breach of warranty theory. Authorities cite two predominant reasons: (1) parties were free to contract out any liability which might result from objective indicia of their intent to guarantee against product defects, and (2) recovery was limited by contract law only to those persons who were privy to the contract of product purchase.[150]

With the landmark decisions of *MacPherson v. Buick Motor Co.*[151] in 1916 and *Henningsen v. Bloomfield Motors, Inc.*,[152] decided in 1960, the

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[146] *Id.* (footnotes omitted).

[147] *Id.*

[148] *Winterbottom*, 152 Eng. Rep. at 405 (Abingier, C.B.).

[149] KEETON ET AL., *supra* note 143, § 96, at 682.

[150] *Id.* at 684.

[151] 111 N.E. 1050 (N.Y. 1916). Concerned there with the liability of a manufacturer of an automobile which had sold its product to a retailer who then resold it to the plaintiff, complete with a defective wheel purchased in turn from a third-party supplier, Justice Cardozo hurdled the requirement of privity, finding the manufacturer liable to the injured plaintiff in negligence. Justice Cardozo concluded that the manufacturer's duty to inspect extended beyond "things which in their normal operation are implements of destruction" to those things whose nature is such "that it is reasonably certain to place life and limb in peril when negligently made." *Id.* at 1053.

[152] 161 A.2d 69, 84 (N.J. 1960) ("Accordingly, we hold that under modern marketing conditions, when a manufacturer puts a new automobile in the stream of trade and promotes its purchase by the public, an implied warranty that it is reasonably suitable for use as such

requirements of privity were largely abrogated in the negligence and breach of warranty theories, except to the extent that they are now controlled by provisions of the Uniform Commercial Code.[153] The doctrine of strict liability in tort for the production of defective products causing injury developed on the heels of the *Henningsen* decision and completely abrogated the requirement of proof of any contractual relationship between the parties.

Following *Henningsen*, the California Supreme Court became the first to impose tort liability upon a manufacturer under the doctrine of strict liability. In *Greenman v. Yuba Power Products, Inc.*,[154] plaintiff sued the retailer and manufacturer of a combination power tool for damages suffered when a piece of wood was thrown by the tool, striking him in the head. At trial, plaintiff had introduced expert testimony that the tool was defectively designed and that certain design changes would have prevented the accident. On appeal of adverse jury findings by both the plaintiff and the manufacturer, the California Supreme Court affirmed the jury award for the plaintiff as against the manufacturer, noting that "[a] manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being."[155] Summarizing the policy choice made by the court in imposing strict liability, Justice Traynor stated, "The purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves."[156]

Responding to this trend, the American Law Institute drafted and adopted Section 402A of the Restatement (Second) of Torts. Section 402A provides, in pertinent part, that:

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
>
> (a) the seller is engaged in the business of selling such a product, and
>
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.[157]

The adoption of this principle of strict liability in tort by both the Restatement and the California Supreme Court had virtually an immediate impact on many courts. It prompted their recognition of the principle of strict liability in tort

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accompanies it into the hands of the ultimate purchaser. Absence of agency between the manufacturer and the dealer who makes the ultimate sale is immaterial.")

[153] *See* U.C.C. § 2-318.

[154] 377 P.2d 897 (Cal. 1963) (en banc).

[155] *Id.* at 900.

[156] *Id.* at 901.

[157] RESTATEMENT (SECOND) OF TORTS § 402A (1965).

and the abandonment of earlier attempts to impose strict liability within the framework of contract warranty.

The applicability of strict liability in tort to component part manufacturers was not so clear, as evidenced by the comments and caveats accompanying Section 402A. Caveat (3), for example, expressly reserves any opinion regarding the Section's applicability to component part manufacturers. Likewise, Comment q reasons that "in the absence of a sufficient number of decisions on the matter to justify a conclusion, the Institute expresses no opinion on the matter."[158] Nevertheless, that same Comment suggests that "where there is no change in the component part itself, but it is merely incorporated into something larger," strict liability should carry through to the ultimate consumer.[159] Thus, in a majority of jurisdictions, an injured plaintiff may recover against a component part manufacturer in strict liability if the plaintiff proves "that the product in question was unreasonably dangerous, that the condition or defect was in the product when sold by the manufacturer, that the assembler made no substantial change in the component, and that the injury was directly attributable to a condition or defect in the component part itself."[160] As with the evolution of product liability law founded on the theory of negligence and breach of warranty, there is no requirement of contract privity between the ultimate consumer and the component part manufacturer or any distributor in the chain.

Even in those decisions which invoke Caveat (3) to support a decision withholding strict product liability where an action lies as against the manufacturer or assembler of the complete product,[161] there is no corollary for concluding that a component part manufacturer cannot be held liable under the Restatement when relief is not available from those other sources.[162] This

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158 *Id.* § 402A cmt. q.

159 *Id.*

160 1 AMERICAN LAW OF PRODUCTS LIABILITY § 8:12, at 20 (Timothy E. Travers et al. eds., 3d ed. 1987); *see also* 1 M. STUART MADDEN, PRODUCTS LIABILITY § 3.22, at 84–85 (2d ed. 1988); Suvada v. White Motor Co., 210 N.E.2d 182, 188 (Ill. 1965). Relying heavily on *Greenman* and section 402A of the *Restatement (Second) of Torts*, the Illinois Supreme Court in *Suvada* concluded that it could "see no reasons" why the manufacturer of a defective brake system, which the seller installed in reconditioning a used tractor, "should not come within the rule of strict liability." *Id.*

161 *See* Goldberg v. Kollsman Instrument Corp., 191 N.E.2d 81 (N.Y. 1963), in which the court found that no strict liability in tort should lie against the manufacturer of an allegedly defective airplane altimeter. The court reasoned that "for the present at least we do not think it necessary so to extend this rule as to hold liable the manufacturer . . . of a component part. Adequate protection is provided for the passengers by casting in liability the airplane manufacturer which put into the market the completed aircraft." *Id.* at 83.

162 1 MADDEN, *supra* note 160, § 3.22, at 84–85.

could occur, for example, because of insolvency on the part of the product assembler.

B. *Repercussions of Jurisdictional Privity*

By infusing the requirement of jurisdictional privity into a plaintiff's ability to sue directly a component part manufacturer, a plurality of the United States Supreme Court has allowed the component part manufacturer to effectively immunize itself from suit by an injured plaintiff—even in those situations where it is the only solvent source of relief. The Court has protected a component part manufacturer from liability by means of jurisdictional privity, where once a manufacturer or component part manufacturer was immune from liability by virtue of the requirement of contract privity. Thus, in a very real sense, jurisdictional privity replaces contract privity in those situations where a component part manufacturer intends only an indirect market for its product in the forum where the plaintiff was injured.

The synergy developed between the law of products liability, as codified in the Restatement, and personal jurisdiction, as interpreted in such cases as *Gray v. American Radiator*,[163] has now been not so neatly undone by a plurality of the Supreme Court in *Asahi*. The implications are startling. In a domestic dispute between an injured plaintiff and a component part manufacturer, the injured plaintiff can bring suit only in those states where the component part manufacturer is domiciled or establishes a direct market for its product. Presumably, amenability could thus be found in the state in which the part manufacturer sells its parts to the product assembler. At best, this is inconvenient to the plaintiff, but at least there is viability to the claim since it can be tried in an American court. A foreign component part manufacturer such as Asahi Metal Industries, on the other hand, can distribute its parts to a foreign product assembler, knowing full well and intending that the final product and its parts reach a lucrative market in the United States. Yet because of the infusion of a foreign distributor into the process, it remains immune from liability because the long-arm of United States courts cannot constitutionally reach it. The synergy between developing product liability law and the power of the courts to hear such claims has been ruptured.[164] As a

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[163] 176 N.E.2d 761 (Ill. 1961).

[164] Perhaps the reconstruction of the citadel as described in this Article is simply reflective of a recent period of stabilization in tort law and the "mild contraction of doctrine" recently debated by a number of torts scholars. *See, e.g.*, Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601, 700 (1992).

matter of international foreign policy, the result may or may not be defensible.[165] As a matter of domestic tort policy, clearly it is not.

IV. CONCLUSION

Prior to *Asahi*, the threshold inquiry for most courts confronted by the issue of component part manufacturer liability was "whether the article produced by the component manufacturer 'is expected to and does reach the user or consumer without substantial change in the condition in which it was sold.'"[166] Intentional placement of the article in the stream of commerce, such that it reached the forum state in the ordinary course of trade, supported expanded notions of liability with corresponding forum ability to hear the case against the manufacturer. Now, however, there has evolved a need to scrutinize the nature of the chain of commercial distribution by which the article reaches the user or consumer. Where once a chain of distribution marked by the constraints of contract privity precluded recovery by consumers injured by those products, there is now interposed a concept of jurisdictional privity between a component parts manufacturer and the forum state, which does essentially the same thing. Thus, forum states may once again allow the artificial structure of a distribution chain to defeat the substantive rights of their injured citizens.

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[165] At least one author has noted that Justice O'Connor's restrictive view of amenability provides foreign manufacturers with a competitive edge over their domestic counterparts. He argues that the direct contact requirement "removes from domestic court jurisdiction foreign manufacturers whose only contacts are indirect forum sales. Foreign manufacturers, thus freed from litigation expenses, would benefit from lower costs. As a result, foreign producers could potentially enjoy a competitive advantage over United States manufacturers in both the domestic and international marketplace." Erik T. Moe, Comment, *Asahi and the Stream of Commerce Doctrine*, 76 GEO. L.J. 203, 223 (1987).

[166] 1 MADDEN, *supra* note 160, at 85.